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Property and the Body: Applying Honoré*

Abstract

This paper argues that the new commercial and quasi-commercial activities of medicine, scientists, pharmaceutical companies, and industry with regards to human tissue has given rise to a whole new way of valuing our bodies. It is argued that a property framework may be an effective and constructive method exploring issues arising from this. The paper refers to A.M. Honoré's theory of ownership and aims to show that we have full liberal ownership of our own bodies and as such can be considered to be self-owners.

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Introduction

The exponential rise in the use, and uses, of human tissue by medicine, scientists, pharmaceutical companies, and industry has given rise to a whole new way of looking at our bodies. Our bodies, along with their part and products, have acquired a value that is different from any traditional conceptions of value in the body. This change has been prompted by the commercial and quasi-commercial activities of the aforementioned people and industries. One of the results of these activities is that we are now, more than ever, concerned about questions of what can and cannot be done with our bodies and their parts and products. However, in order to explore and solve conflicts that arise in this area we need an appropriate framework within which to work. Since the new concerns surrounding the body and its tissues are essentially about issues of control and of ownership[1], one approach might be to consider each of us as a self-owner and our bodies, and human tissue in general, as being subject to property or at least quasi-property rights.

Self-ownership, and the concept of the body as property are sometimes rejected on the grounds that their acceptance might lead to practices considered by some to be morally objectionable. Such practices might include the sale of organs, the right to engage in prostitution, and the right to sell or give oneself into slavery. Additionally, self-ownership could entail claims that not only do we own our bodies but also our detached parts and products and could be taken to include not only our sperm and eggs but by extension our embryos, our fetuses, and even our children.[2]

It is perhaps because of these seemingly radical end-points that one might want to dismiss self-ownership out of hand. However, considering the body within a property framework may be an effective and constructive method of approaching difficulties arising from the changing conception of

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value associated with it. Of course a property framework is not the only way to explore the question of what can and cannot be done to our bodies and parts; another way might be within traditional notions of battery and trespass to the person. However, implicit in these approaches is the concept of a damaging act, and our consideration of an individual's rights with regard to their body and our concerns over the use and control of our bodies, and its parts and products are not confined to considerations solely to do with damage. A property framework, however, can deal with these and is, therefore, a useful one. By including the body in the list of things which we now call property we place it within a normative framework which can help to identify what issues really divide us when considering dilemmas about the use and control of our bodies and their parts.

The aim of this paper is to place the human body within a coherent property framework.[3] For reasons which will be elaborated upon below the model of property I use is that of A.M. Honoré[4]. Specifically I want to show that if, as Hillel Steiner maintains, self-ownership consists in us having "full liberal ownership of our bodies" (p.232)[5]; and if, as A.M. Honoré[4] claims, having 'full ownership' consists in us holding most of the elements of ownership, then we can be said to be self-owners if we can be shown to hold most of these incidents with regards to our bodies.[6]

Honoré, Property Rights, and Self-ownership

In trying to determine what ownership actually is A.M. Honoré set out an account of what he conceived to be the standard incidents of ownership. Through a review and analysis of the jurisprudence in property he arrived at a set of eleven rights, duties and other elements which when combined together give an account of ownership. These incidents of ownership are:

1. the right to possess,
2. the right to use,
3. the right to manage,
4. the right to the income of the thing,
5. the right to the capital,
6. the right to security,
7. the right of transmissibility
8. the right of absence of term,
9. the duty to prevent harm,
10. liability to execution, and
11. the incident of residuary. (p.165)[4]

According to Honoré, for full ownership in a thing to be recognised, an individual must hold most (but not necessarily all) of these elements regarding that thing.

This analysis incorporates the Wittgensteinian concept of family resemblance.[7] Wittgenstein uses the example of games and shows us that

there is no single characteristic or group of characteristics that all 'games' have in common. There is, however, "a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities".[8] In the context of Honoré's incidents this addresses a major problem that is often associated with theories of property and ownership: that is that not all things generally considered to be property share all the same characteristics or sets of characteristics. Honoré's approach is open and flexible because while each of the eleven incidents of ownership may not be applicable to things we consider to be property, each item within the 'group' of property will share similarities and relations with other items in the group. It is this openness in the theory which is its advantage over other theories of property and ownership such as those derived from Lockean natural rights theory.[9] It is also because of this that his theory lends itself to considerations of the body as property more aptly than that of other theories.

Honoré and the Human Body

Honoré's conception of property, however, is rarely applied to the realm of the body and that of human biological materials. Indeed Honoré himself claimed that "a person does not either 'own' or 'have' his body or liberty" (p.180)[4] and that in the case of the self the parallel with ownership is not convincing.[10] However, when he wrote the original paper in 1960 transplant surgery was in its infancy, stem cells had only just been discovered, and a multitude of medical technologies and applications utilising the body, and its parts and products were decades away. The development of these and the commercial and quasi-commercial activities surrounding them means that we necessarily have to think about and treat the body in a manner different to that envisaged by Honoré and his contemporaries.

Björkman and Hansson went some way to incorporating Honoré's incidents into a theory of bodily rights,[11] but they rejected Honoré's application of Wittgenstein's concept of family resemblance to the incidents of ownership. They do this reasoning that "it does not seem to be a specific enough tool for analysing ownership in modern capitalist societies".(P.211)[11] However, it is exactly this lack of specificity that is the strength of this theory of ownership, especially in its application to the human body.

The adaptability of Honoré's theory shows how the body might be considered property on some occasions or in some situations but not others. For that reason it simply does not matter if it is concluded that, for example, the right to the income of the thing when applied to the body does not include the sale of body parts. And it is not a fatal flaw if it is concluded, as Munzer did, that several incidents are missing in relation to the human body and its parts.[12] The theory's flexibility appositely manages such perturbations. Such a formulation means that the theorist who is minded to reject self-ownership because of some of the radical extensions mentioned earlier, the sale of organs, slavery, etc., can still embrace the conception of

self-ownership set out in this paper. The normative framework of the model can help us to move on from abstract disputes about ownership itself and to identify what issues really divide us when considering dilemmas about the use and control of our bodies and their parts that have arisen in the new quasi-commercial climate surrounding human tissue. This, in turn, can lead to debate which is more focussed, more fruitful, and, ultimately, more likely to be resolved one way or the other.

Applying the incidents

If as Hillel Steiner contends, self-ownership consists in us having “full liberal ownership of our bodies” (p.232)[5], and if, as Honoré contends having ‘full ownership’ consists in us holding most of the elements of ownership, then we can be said to be self-owners, and to have property in our own bodies, if we can be shown to hold most of these incidents with regards to our bodies. This is important because if it can be shown that the body satisfies the criteria for property then anybody who believes in private property ought to be committed to treating it as such. Additionally, if we start from a position of self-ownership then this at least raises the presumption of property in the body’s separated parts and products.

To investigate how Honoré’s incidents might relate to the body[13] I now want to look at each of the incidents and some possible applications of each of them. The application of many of these incidents to the human body might not be especially contentious and as such I will only briefly dwell upon these. There are, however, some incidents (or aspects of them) which could be seen as more controversial. These are those incidents which Munzer would deem to be ‘missing’ and which other authors might claim to be ‘inalienable’ or ‘non-tradable’.(p.212)[13] As explained above, however, Honoré’s theory because of its Wittgensteinian heritage can accommodate differences in the incidents required in order to call the body property.

1. The right (claim) to possess

According to Honoré this is the right to have exclusive physical control of a thing. He maintains that there are two aspects of this control: the right to be put in control and the right to remain in control. The notion of being put in control of our bodies may seem odd because there is the question of who puts us in control: our parents, the state, something or someone else? The answer to this may actually incorporate all of these. There are, it seems, an implicit set of rules which govern us from the day we are born through to us becoming adults. Within these as we grow and mature towards competent adults we are gain evermore control over our lives and our bodies, being permitted to do more and more. Whether or not we can identify the exact giver(s) of that control is matter less since it is clear that we do indeed gain this control. More importantly once in control it is embedded in this right is that others should not interfere (without permission) with this control. That society concurs with this is most clearly in evidence through our law of *habeus corpus*.

2. The right (liberty) to use

Two interpretations of 'the right to use' are identified by Honoré. The first broad interpretation sees 'use' as encompassing 'management' and 'income', however, these are more appropriately encompassed within incidents three and four. The second narrower interpretation "refers to the owner's personal use and enjoyment of the thing owned" (p.168)[4], and it is this interpretation that applies readily to our bodies. While others can also use our bodies for their 'personal use and enjoyment', they can only legitimately do so with our permission. Even a kiss without permission constitutes a battery.

3. The right (power) to manage

This is the right to how and by whom the property can be used. This includes activities such as lending and contracting-out. Regarding our bodies this would mean that, within his sphere of management, the owner has the power to determine the terms of usage and any restrictions that he may put on his body. This incident can be seen as being intimately linked with the right to use.

4. The right (claim) to the income of the thing

The right intended here overlaps with 'the right to use' in that we can understand deriving an income from the property as enjoying the (use of) property. However, on a more legalistic basis we understand 'income' to be money received for work or through investments. Honoré describes this as 'a surrogate of use' as we typically give up our own use of the thing in return for some remuneration. In terms of the body this occurs whenever we go to work and are paid for our labour. More controversially this can be seen as occurring where an individual sells their body or body parts or products.[14] An example of the temporary selling/renting of the whole body might be prostitution.

5. The right (power and liberty) to capital

This right consists of two aspects: the *power* to alienate and the *liberty* to consume or destroy the object. To Honoré the power to alienate is the more important of these. This power can be exercised during life or on death "by way of sale, mortgage, gift or other mode" (p.170)[4], and one can choose to alienate all or part of the object. Munzer maintains that this is one of the incidents that is missing with regards to the body,[12] but there are many instances where we do in effect alienate parts of our bodies and generally do not have any problems with this. We do this whenever we have our hair cut or clip our nails, it happens when we give blood, and it is indisputable that this is what is happening when a kidney is donated to a sick relative, or to a stranger. The most extreme interpretation of this right occurs when a person commits suicide. This can be seen to involve both destruction and alienation of the self.

6. The right (immunity) to security

This is the assurance that a person will remain the owner of their property and will not be forced to give it up without adequate recompense. We can see how this is applied if we look at the example of compensation for wrongful death. This can be seen recompense for the expropriation to the next of kin or relatives of the deceased. It is compensation for the interest that they had in his body and any income he might have produced through his labour.

7. The rights (power) of transmissibility

This is the *power* to transfer ownership/one's property rights in the thing to another person. This can be done in any one of a number of ways, for example, by simply giving the thing away, through the sale of the thing, or at death through one's will to their successors. Applied to the body it would be the *power* to transfer my rights regarding my body to another by delegating proxies to take vital decisions for us regarding our bodies. We already do this on a small scale every time we abdicate some aspect of control or decision-making to others. An example of this might be when patients seek medical treatment. Given that they often have only limited knowledge of the different treatments for whatever ails them, they may defer to the advice of the doctor as to which is the most appropriate. A radical implementation of the power to transfer one's rights would be the power to enslave oneself and hand over not some but all of your rights,[15] thereby losing the liberty to be the author of your own life.[16]

8. The right (immunity) to absence of term

This is the owner's right to an indeterminate length of ownership. It is an immunity from the expiration, without justifiable reasons, of one's rights regarding the property. Long-lived rights are characteristic of property because what we now call property rights have evolved specifically to deal with things that are long-lasting such as land, buildings, and personal possessions. These things may even out-live their owner. To the individual, however, what can be more long-lived than their own body? And they would certainly want their rights of ownership to last as long as they do.

9. The duty to prevent harm (disability)

This is the duty of the owner not to use the property in a way that harms other members of society. Additionally Honoré maintains that the owner must also prevent others from using his property in a way that harms others. To paraphrase an oft used example 'I may place my knife anywhere I like but not in your chest'. Equally I may not use my body in a way that harms others, for example, the use of physical violence towards them.

10. The liability to execution

This incident recognises the legal responsibility of owners regarding their debts. They are accountable for these and may be liable to have their property seized in payment for them. Although perhaps not immediately obvious this does apply to the body. We are all aware of the threat of bailiffs if a debt remains unpaid. We can settle the debts in a variety of ways. These are most frequently paid either with money or by taking certain items of non-cash property away from us (televisions, furniture, our house, etc.) While we no longer have a debtor's prison in this country, individuals can still be imprisoned for contempt of court if they refuse to make payments or pay fines following a court order. When this happens it is clear that the non-payment of debts *does* involve the seizing of our bodies.

11. The incident of residuary (liability)

The last incident I wish to comment on is the incident of residuary. This recognises that sometimes rights of ownership either expire or may be abandoned. Should this happen the corresponding rights become vested in or are exercisable by someone else. In certain circumstances this 'someone else' may be the state. In relation to the self this expiration of rights seems, most notably, to occur at death. Here our rights with regard to the self must necessarily cease as we can no longer be deemed capable of possessing any rights. The rights regarding our body then become vested in another – usually our next of kin. However, some of the rights in our bundle may become vested in the state, for example, in the event of a coroner's post-mortem being required.

Conclusion

In this paper I set out to place the human body in a coherent property framework. I did this because a property framework can help to identify the issues that divide us in the new commercial climate that the body and human tissue exists in. Specifically Honoré's theory of ownership was used. Other theories could have been utilised but, not only is Honoré's theory a better and more complete theory in and of itself, its Wittgensteinian heritage makes it an open, adaptable, and meaningful tool. This flexibility also lends itself to considerations of the body as property more aptly. It might be, as I would argue, that all of Honoré's incidents are applicable to the human body in the manner set out above, but on this theory it is not incumbent upon everyone to agree fully with way in which the incidents are applied in this paper. The 'family resemblance' model accounts for and is able to deal with such differences allowing for the body to still be considered as property within this theory.

Additionally the paper aimed to establish that if self-ownership consists in us having 'full liberal ownership of our bodies'; and if having 'full ownership' consists in us holding most of the elements of ownership, then we can be said to be self-owners if we can be shown to hold most of

these incidents with regards to our bodies. An analysis of Honoré's incidents of ownership shows that the rights, duties and other elements required to give an account of ownership are indeed applicable to the human body. If this is right, then if we are to escape or evade the conclusion that the body is property, arguments strong enough to defeat Honoré's incidents are required. The provision of such arguments is conspicuously absent from the work of those who insist on treating the body as if it (a) is not; (b) could not be; and (c) should not be property.

So it seems that when it comes to my body I can say, with the support of the most complete theory of property that we have, that 'I own that' or 'that is my property'. We can each claim to have 'full liberal ownership of our bodies', and to have property rights in our own bodies. This also raises, at least, the strong presumption that we own our body's separated parts and products. The implications of this are far-reaching, extending from simple rights of control over my person to the right to sell my body parts to the right to self-enslavement. They may also include the theses that we own not only our sperm and eggs, but our embryos, foetuses and children too. While exploring the nature of these hard cases lies outside the scope of this paper and is a job for another occasion, I fully accept that it is because of these that the applications of Honoré's incidents as I have set them out may be somewhat controversial. However, it seems to me that a society which truly values individual liberty would not shy away from such consequences and the ensuing responsibilities which stem from the 'full liberal ownership of our bodies' that each of us ought to be entitled to.

References

1. *Moore v Regents of the University of California* 793 P 2d (Cal, 1990) is a good example of how advancing biotechnology and the commercial activities surrounding such technology can lead to concerns over the control and ownership of human tissue.
2. For discussions of some of these concerns see Jansen, R.P.S. Sperm and Ova as Property. *J. Med. Ethics* 1985; 11: 123-126; Joralemon D., Cox P. Body Values: The Case against Compensating for Transplant Organs. *The Hastings Center Report* 2003; 33(1): 27-33; Munzer S.R. An Uneasy Case against Property Rights in Body Parts. *Social Philosophy and Policy* 1994; 11(2): 259-286; Nelkin D. Andrews L. Homo Economicus: Commercialization of Body Tissue in the Age of Biotechnology. *The Hastings Center Report* 1998; 28(5): 30-39; O'Connell Davidson J. The Rights and Wrongs of Prostitution. *Hypatia* 2002; 17(2): 84-98
3. For wider reading on property, ownership, and self-ownership see Calabresi, G., 'Do we Own our Bodies?' in *Health Matrix* 1(5) 1991: 5-18; Cohen, G.A., *Self-Ownership, Freedom, and Equality* (Cambridge University Press: Cambridge, 1995); Gold, R.E., *Body Parts: Property Rights and the Ownership of Human Biological Materials* (Georgetown University Press: Washington, 1996); Harris, J.W., 'Who Owns My Body'

in *Oxford Journal of Legal Studies* 16(1) 1996: 55-84; MacPherson CB. *Property: Mainstream and Critical Positions* (Oxford: Basil Blackwell, 1978); Munzer SR. *A Theory of Property* (Cambridge: Cambridge University Press, 1990); Nozick, R., *Anarchy, State, and Utopia* (Basil Blackwell: Oxford, 1974) and Waldron J. *The Right to Private Property* (Oxford: Clarendon Press, 1988).

4. Honoré AM. Ownership. *Making Law Bind: Essays Legal and Philosophical* Oxford: Clarendon Press. pp. 161-192. The original was published in Guest, A.G. (Ed.) *Oxford Essays in Jurisprudence*, Oxford: Oxford University Press, 1961. pp.107-47.

5. Steiner H. *An Essay on Rights*. Oxford: Blackwell, 1994.

6. It must be noted that this is an Anglo American / Western European conception of property and the body.

7. This was not explicit in the original text but was suggested by Richard Flathman in 'On the Alleged Impossibility of an Unqualified Disjustificatory Theory of Property Rights' in Pennock R.J. and Chapman J.W. (Eds) *Property Nomos XXII*, New York: New York University Press.

8. Wittgenstein L. *Philosophical Investigations* translated by Anscombe G.E.M., Oxford : Basil Blackwell, 1968, p.32

9. It is more usual for authors to use Lockean labour theory as the basis of their self-ownership theories. See Locke J. *The Second Treatise of Government: An Essay Concerning the True Original, Extent and End* in Laslett, P. (Ed) *John Locke, Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus* (Cambridge: Cambridge University Press, 1964).

10. Honoré admits that the reason for this may merely be a deficiency in legal linguistics as the body is not an "external material object"; however, he declares that it is more likely to be because "it has been thought undesirable that a person should alienate his body". Ref. 4, p.180.

11. Björkman B, Hansson SO. Bodily Rights and Property Rights. *J. Med. Ethics* 2006; 32: 209-214.

12. Munzer SR. *A Theory of Property*. (Cambridge: Cambridge University Press, 1990). Although he does argue that we may have limited property rights in our bodies.

13. Here I use the words body and self interchangeably.

14 .Examples of this might be hair, blood, semen, and kidneys. While it is illegal to sell all of these, with the exception of hair, in this country, it must be noted that there may be a difference between what is unlawful and the normative moral position on this issue.

15. As Steiner astutely puts it “it’s not that slaves have few rights: they have none”. Ref. 2, p.231.

16. For a discussion on slavery and self-enslavement see Hare RM. What is Wrong with Slavery? *Philosophy and Public Affairs* 1979;8:104; Kufflick A. The Inalienability of Autonomy. *Philosophy and Public Affairs* 1984;13:271; Kant I. *The Metaphysics of Morals*. Cambridge: Cambridge University Press, 1991; and Mill JS. *On Liberty and Other Essays*. New York: Oxford University Press, 1991.